Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Protecting Consumers from Unauthorized Carrier Changes and Related Unauthorized Charges	CG Docket No. 17-169

COMMENTS OF TELPLEX

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COMMENTS OF TELPLEX

Preferred Long Distance, Inc. d/b/a Telplex ("Telplex") respectfully submits these comments in response to the Federal Communications Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding.

INTRODUCTION AND SUMMARY

Chairman Pai recently stated that "the FCC should always take economics seriously, because the alternative is regulation by anecdote."[1] But even "anecdotes about outcomes we don't like do not indicate market failure, nor do they present sufficient argument for government intervention."[2] Telplex respectfully submits that in this proceeding, the Commission is walking into the same trap that Chairman Pai so recently warned against. All of the bases for the rules under consideration are based on anecdote and without a clear picture of the overall ability of *all* consumers to switch their carriers.

Indeed, through this proceeding, the Commission is proposing to drastically curtail the ability of smaller switchless carriers to compete against incumbents by making it more difficult for consumers to switch their carriers. Such rule changes would necessarily reinforce the incumbent carrier's market power, particularly over switchless resellers that have no reciprocal rights to freeze their customers in the incumbent carrier's switch. Yet the Commission never explains how its existing rules fail to strike the appropriate balance to protect consumers while not unduly restricting their ability to switch carriers. Accordingly, if the Commission is serious about data-driven decision making, Telplex outlines below a number of questions that the

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[1] Remarks of FCC Chairman Ajit Pai at the Hudson Institute, "The Importance of Economic Analysis at the FCC," at 3. Available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-344248A1.pdf.

[2] *Id.*

Commission should explore before it can justify whether any rules changes in this proceeding make economic sense.

Telplex emphasizes that it too shares the Commission's goal of protecting consumers from slamming and cramming. Truly bad actors should be penalized for intentionally switching consumers' carriers without their authorization or under false pretenses. The Commission, however, appears to take the view in the NPRM that protecting consumers and protecting the ability of carriers to compete is a zero-sum trade off. This is a false dichotomy.

Accordingly, Telplex strongly opposes the Commission's proposals in the NPRM that would either make freezes mandatory for all customers or require the losing carrier to "double check" with customers to confirm their decision to leave. There is no economic justification for either of these proposals, which would drastically harm competitive carriers and competitive choice for all consumers. Instead, to the extent additional consumer protections are justified after a factual record is developed in this proceeding, Telplex proposes below added requirements to the existing third-party verification ("TPV") process that should be able to eliminate any legitimate slamming complaints without unduly impeding competition.

I. THE PROPOSED RULES ARE NOT JUSTIFIED BY FACTS SUFFICIENT TO MEET THE COMMISSION'S BURDEN UNDER THE APA

The Administrative Procedure Act requires an agency, at a minimum, to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the **facts found** and the choice made.'"[3] Further, where, like here, the agency's "prior policy has engendered serious reliance interests that must be taken into

[3] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted, emphasis added).

account,"[4] an agency must "provide a more detailed justification" for changing its prior policy.[5] Any order resulting from this NPRM would be fatally compromised because "[t]hese rules … are not based on facts or data but on unsubstantiated fears" and unvetted allegations.[6] As Chairman Pai previously posited, "[t]he evidence of these continuing threats? There is none; it's all anecdote, hypothesis, and hysteria … The bogeyman never had it so easy."[7]

Specifically, there are only two "justifications" set forth in the NPRM to support the drastic rule changes proposed by the Commission. First, for the last two years, under 4,000 slamming and cramming complaints have been filed with the Commission each year.[8] Second, the Commission cites several recent NALs and Forfeiture Orders "arising from *apparent* carrier misrepresentations."[9] As addressed below, neither of these purported reasons for the proposed rules are grounded in actual facts, much less actionable intelligence that would allow one to conclude that the rules under consideration would do more good than harm.

A. Allegations In Informal Complaints Are Not Facts Upon Which The Commission Can Rely

The only conclusion that one can reasonably draw from the Commission supposedly receiving 4,000 slamming and cramming complaints per year is that 4,000 people file slamming and cramming complaints per year. One cannot logically infer from the number of complaints

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4 Telplex has spent over a decade developing and refining its customer-acquisition process that relies on the TPV method long endorsed by the Commission. This necessarily includes the incredible amount of time and effort locating and contracting with reliable independent telemarketing contractors that fully understand the Commission's slamming regulations. At bottom, as a small, family-owned telephone company, the TPV process is the only proven method that Telplex allows Telplex to market its services in a cost-effective way.

5 *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

6 Dissenting Statement of Commissioner Michael O'Rielly, *Protecting and Promoting the Open Internet*, GN Docket No. 14-28

7 Dissenting Statement of (then) Commissioner Ajit Pai, *Protecting and Promoting the Open Internet*, GN Docket No. 14-28.

8 NPRM, ¶ 5.

9 NPRM, ¶ 6.

filed whether any of those complaints are meritorious. Notably, the Commission failed to provide any data on the number of complaints it has *granted*, which could be an actual measure of whether there is indeed a problem that needs to be addressed – assuming the Commission conducted an actual investigation into the complainants' allegations, weighed the evidence and came to a decision as a neutral umpire.

As explained in greater detail below, that was far from standard operating procedure during the Wheeler Commission. Unfortunately, there appears to be a troubling continuation in the Commission's failure to recognize that an **allegation is not a fact**. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("mere allegations" are not facts); *see also In re Grand Jury Subpoena*, 419 F.3d 329, 336 (5th Cir. 2005) ("Allegations in pleadings are not evidence."); *Petro Franchise Sys., LLC v. All Am. Props., Inc.*, 607 F. Supp. 2d 781, 801 n.12 (W.D. Tex. 2009) (same); *Barrie v. Intervoice-Brite, Inc.*, No. 3:01-CV-1071-K, 2009 WL 3424614, at *9 (N.D. Tex. Oct. 26, 2009) (same); *Long Island Savings Bank v. United States*, 503 F.3d 1234, 1244 (Fed. Cir. 2007); *L.P. Consulting Grp., Inc. v. United States*, 66 Fed. Cl. 238, 243 (2005); *United States v. Robinson*, No. 10-CR-239S, 2014 WL 2207970, *3 (W.D.N.Y. May 28, 2014 (a defendant "enjoys a presumption of innocence and the Government's allegations are not evidence"); *Muzaffarr v. Ross Dress For Less, Inc.*, CIV No. 11-61996, 2013 WL 1890274, *2 (S.D. Fla. May 7, 2013) ("Factual allegations are not evidence") (citation omitted); *Kauffman v. CallFire, Inc.*, CIV No. 3:14-1333-H-DHB, 2015 WL 6605459, * 5 (S.D. Cal. Oct. 8, 2015) ("A complaint is an allegation of an illegal act, not notice of an illegal act.").

It is thus an uncontroversial proposition that an allegation is not a fact, but merely a contention that must be tested before it can be accepted as true. This is basic due process; a complaint does not prove itself. The Commission implicitly acknowledged this fundamental

notion when it held that TPV recordings were intended to "serve as **evidence** to rebut a subscriber's **allegation** of an unauthorized switch."[10] Unfortunately, the Commission seems to be doubling down on its failure to afford due process protections to carriers, actually investigate complaints and weigh the evidence as a neutral umpire. The Commission is essentially allowing unvetted allegations to become unassailable "facts," and then turning enough of those anecdotes into "data." To paraphrase Chairman Pai, such a result should be unthinkable.[11]

The Commission's assertion that "slamming and cramming continue to be a problem"[12] based solely on a certain number of consumers filing unverified, informal complaints the last two years is therefore deeply problematic and cannot withstand judicial scrutiny. Indeed, the Commission's reliance on the number of complaints filed is particularly untenable in this situation given that the Commission's regulations actually *incentivize* consumers to file complaints, regardless of merit.[13] Thus, there is no *factual* record that could possibly justify the rule changes under consideration, let alone the more detailed justification required in these circumstances where carriers have serious reliance interests structured around the existing third-

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10 *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers*, Second Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 1508, ¶ 70 (1998) ("*Second R&O*") (emphasis added); *see also* 47 C.F.R. § 64.1150(d) ("the alleged unauthorized carrier shall provide to the relevant government agency a copy of any valid proof of verification of the carrier change. This proof of verification must contain clear and convincing evidence of a valid authorized carrier change, as that term is defined in §§ 64.1120 through 64.1130. The relevant governmental agency will determine whether an unauthorized change, as defined by § 64.1100(e), has occurred using such proof and any evidence supplied by the subscriber.").

11 Remarks of FCC Chairman Ajit Pai at the Hudson Institute, "The Importance of Economic Analysis at the FCC," at 1 ("Imagine if Bill James said you didn't need empirical data as long as you had enough anecdotal evidence. It would be unthinkable.").

12 NPRM, ¶ 5.

13 *See* 47 CFR §§ 64.1160, 64.1170. There is also no requirement to verify the allegations under penalty of perjury. *See* https://consumercomplaints.fcc.gov/hc/en-us/requests/new?ticket_form_id=39744.

party verification process.

B. The NALs and Forfeiture Orders Similarly Are Not Based On Any Evidence

The Commission specifically highlighted four enforcement actions to justify the proposed rules under consideration issued during former Chairman Wheeler's tenure.[14] These orders establish that if there is a problem with respect to slamming complaints, it relates to the prior Commission's decision-making process.

Indeed, as Commissioner O'Rielly wrote earlier this year, "[a]t a time when Commission leadership has changed and is reconsidering its approach to many issues across the agency, there needs to be a realization from everyone that those priorities of the past Commission – not directly required by statute – should not necessarily be the focus of staff time. With resources at such a relative premium, staff attention shouldn't be spent pursuing outdated goals. **This concept should apply not only to our policy bureaus but the enforcement shop as well**… Moreover, our **enforcement staff should move away from headline grabbing and eye popping penalties that will never be collected**."[15]

One of the main reasons why many of the prior Commission's Forfeiture Orders will never be collected is that the orders were not based on any facts at all, but relied exclusively on unvetted allegations that the Commission never corroborated, even in the face of evidence that entirely exonerated the carrier of any wrongdoing. Respectfully, the Commission is not entitled to its own set of facts. Yet the reality is that the prior Commission was making findings that were directly contradicted by the evidence before it. This suggests that there was something fundamentally broken with the prior Commission's decision making process, seriously calling

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14 NPRM, ¶¶ 6-9.

15 *See* https://www.fcc.gov/news-events/blog/2017/03/22/improved-staff-openness-new-priorities. (emphasis added).

into question the few enforcement actions that purportedly justify the rule changes under consideration.[16]

While no one wants to relitigate Forfeiture Orders issued during Chairman Wheeler's tenure in this proceeding, the new leadership needs to understand that these old decisions simply do not provide any factual foundation for the new rules under consideration. Basing sweeping rule changes that will dramatically curtail consumers' ability to switch their carriers on such clearly erroneous enforcement actions amounts to doubling down on the indefensible mistakes of the prior Commission. But in the final analysis, this Commission has not put forth any evidence that would justify the significant departure from the existing rules, as required by the APA.

II. THE COMMISSION IS NOT ENGAGING IN EVIDENCE-BASED, DATA-DRIVEN DECISIONMAKING

Chairman Pai recently invoked Cass Sunstein, stating "'[i]t is not possible to do evidence-based, data-driven regulation without assessing both costs and benefits, and without being as quantitative as possible.' Hence, **it is the duty of regulators** to 'obtain a careful and objective analysis of the anticipated and actual effects of regulations, whether positive or negative. We need to look at the evidence and data. We need careful assessments before rules are issued, and we need continuing scrutiny afterwards.' **I agree**."[17]

Here, however, there does not appear to be any attempt by the Commission to even elicit basic data that would allow the Commission's economists to conduct the most rudimentary analysis of whether any rule changes are even justified, let alone the costs and benefits of the proposed rules as it relates to consumer choice and competition. Indeed, one would have expected the Commission to provide answers to the following questions, or at least ask

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16 NPRM, ¶¶ 5-10.

17 *See* Remarks of FCC Chairman Ajit Pai at the Hudson Institute, "The Importance of Economic Analysis at the FCC," at 3 (emphasis added).

stakeholders some of these questions itself:

- How many slamming and cramming complaints were *granted* in 2015-2016 out of the 8,000 filed?
- How many total landline carrier changes occurred in 2015-2016?
- How many slamming and cramming complaints were filed so far in 2017?
- How many slamming and cramming complaints were granted so far in 2017?
- How many total landline carrier changes occurred so far 2017?
- Based on this data, is there a statistically significant number of complaints compared to the total number of carrier changes, i.e., is there even a problem worth addressing?
- How do complaints filed against competitive carriers compare to dominant carriers?[18]
- How many of these complaints alleged some sort of misrepresentation by the telemarketer?
- What is the percentage of slamming and cramming complaints that involve TPVs compared to other verification methods?
- For those complainants alleging a misrepresentation by the telemarketer, did the associated TPV recordings contain clear and convincing evidence confirming "that the person on the call understands that a carrier change, not an upgrade to

[18] Verizon Wireless, for example, has had approximately 35,000 complaints filed against it with the Better Business Bureau ("BBB"). *See* https://www.bbb.org/new-jersey/business-reviews/cellular-telephone-service-and-supplies/verizon-wireless-in-basking-ridge-nj-1001468. Over 26,000 consumer complaints have been filed against AT&T Mobility with the BBB, and another 22,000 complaints have been filed against AT&T. *See* https://www.bbb.org/atlanta/business-reviews/cellular-telephone-service-and-supplies/atandt-mobility-in-atlanta-ga-1608/reviews-and-complaints; https://www.bbb.org/atlanta/business-reviews/telephone-companies/atandt-in-atlanta-ga-7935.

existing service, bill consolidation, or any other misleading description of the transaction, is being authorized," as required by Rule 64.1100(c)(3)(iii)?

- How many complainants have disputed the authenticity of their TPV recordings?
- How do all of the statistics above compare to the 5-10 year period prior to 2015?

As discussed above, however, the Commission's only "evidence" of a "continuing problem" is that "in the two-year period from the beginning of 2015 through the end of 2016, the Commission received almost 8,000 slamming and cramming complaints."[19] Even if one were to assume that 4,000 people *filing* slamming or cramming complaints a year is apropos of anything, one would still not be able to infer from this number whether 4,000 complaints represent a statistically significant problem that demands a solution, much less the solutions proposed in the NPRM. It is difficult to see how this is anything other than "regulation by anecdote," which Chairman Pai recently warned so strongly against.

Instead, as noted above, a serious inquiry would entail, at the very least, understanding the scope of the perceived problem, including the baseline number of carrier changes that occur in a given year. Publicly available reports state that "annual churn rates for telecommunications companies average between 10 percent and 67 percent,"[20] which indicates that there are millions of carrier changes each year, even at the low end of the churn ratio. 4,000 slamming and cramming complaints out of a total annual landline churn of approximately 12,000,000[21] million carrier changes would amount to a complaint rate of 1 complaint for every 3,000 carrier switches, or as stated as a decimal, 0.0003.

One would expect that this minute fraction of complaints should lead the Commission to

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19 NPRM, ¶ 5.

20 *See* http://www.dbmarketing.com/telecom/churnreduction.html.

21 This figure is estimated using the 2016 number of U.S. households of 125 million and assuming that there is churn rate of 10% for this figure.

believe that its current carrier-change rules are in fact working extremely well. To put things in perspective, 6 out of 100 Americans, or roughly 20,000,000 people, believe that the moon landings were faked.[22] Simply put, it is not reasonable to assume that everyone is reasonable, including consumers who file complaints.[23] Thus, having only 4,000 people out of millions complain about their experience switching to a new telephone carrier certainly suggests that there is not in fact a "continuing problem," particularly when both complainants and the losing carrier have a clear financial incentive to have complaints filed against the winning carrier.

Moreover, complaints filed as "slamming" complaints often begin as "billing" complaints brought on by a case of buyer's remorse. For instance, a consumer can underestimate how much they actually use the phone when switching from an unlimited plan to a metered plan. Similarly, a consumer can have a case of bill shock due to the first bills being pro-rated and billed in advance, which can unfortunately turn into a frivolous slamming complaint.

Basing the conclusion that there is a continuing slamming problem solely on the number of complaints filed per year is problematic for a number of additional reasons that the Commission should also consider. For example, if there has been a recent increase, can it be explained by AT&T's decision to stop third-party billing last year?[24] Indeed, many resellers recently had complaints filed against it with the Commission by individuals who had been

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22 *See* http://www.gallup.com/poll/3712/landing-man-moon-publics-view.aspx. Between 19%-25% of the U.S. population also believes that the federal government was behind the 9/11 attack. *See* http://www.npr.org/2014/06/04/318733298/more-americans-than-you-might-think-believe-in-conspiracy-theories; *see also* http://www.chicagotribune.com/news/opinion/zorn/.

23 *See* https://www.facebook.com/FCC.

24 AT&T Service decided to terminate LEC billing for third-party competitors like Telplex under the guise of complying with an August 16, 2016 Order issued by the Enforcement Bureau. *See* Order, available at https://apps.fcc.gov/edocs_public/attachmatch/DA-16-771A1.pdf. This Order, however, expressly stated that it was not the Commission's intent for AT&T to cease third-party billing for telecommunications services like those at issue here. Order, n.2. Despite this, AT&T determined that it would no longer place third-party charges for competitive telephone carriers' telecommunications services on its LEC bills.

customers for years, and in some cases, over a decade, but were confused by resellers' attempts to start direct billing as a result of AT&T's actions.

In addition, are there one or two major carriers that are driving these complaints, such that the Commission's standard enforcement powers would be the more appropriate and less disruptive solution? Is the Commission including duplicate complaints that are also filed with state public utility commissions? There have been numerous times within the last few years that resellers have successfully resolved complaints at the state level, only to have the consumer refile at the Commission in order to get a second bite at the apple. Telplex respectfully submits that if the Commission is serious about the perceived "continuing problem" of slamming and cramming, it should be able to answer these questions and provide detailed data to stakeholders to provide meaningful analysis and tailored solutions.

As it stands, the "facts" set forth in the NPRM to justify the Commission's proposed actions in this proceeding are not facts at all, but unsubstantiated allegations contained in informal and unvetted complaints filed by a statistically insignificant fraction of consumers who have an incentive under the Commission's rules to file complaints. Even if it were appropriate to reflexively believe the allegations contained in these complaints – which it is not – the fact that 4,000 complaints were filed each of the last two years is so superficial as to be meaningless. The Commission is thus poised to drastically curtail the ability of small carriers to compete in the marketplace and make it more difficult for consumers to switch their service away from incumbents based on unvetted anecdotes.

III. THE RULES UNDER CONSIDERATION WOULD GIVE INCUMBENT CARRIERS EVEN MORE MARKET POWER AND CONTROL OVER SWITCHLESS RESELLERS

As Chairman Pai recently observed, a "key problem I see with economic analysis at the FCC is that cost-benefit analysis is largely ignored. **The public interest standard has become**

a free pass to adopt rules without a meaningful attempt to determine the net benefits. And the agency also hasn't taken seriously its duty to conduct a Regulatory Flexibility Analysis during rulemakings to consider how our rules might affect small businesses."[25] It is difficult to understate how accurately this criticism applies to the present NPRM, particularly as it relates to the already uneven playing field that favors incumbent carriers over switchless resellers.

As that terms indicates, switchless resellers do not have their own switches, and all the applicable customer data resides in the ILEC switch. Thus, if a switchless reseller's customer attempts to contact the operator, the customer will reach the ILEC's representative, not the switchless reseller. This fact alone often causes confusion about the relationship between the switchless reseller and the incumbent and can lead to slamming or cramming complaints through no fault of the switchless reseller.[26]

Indeed, the switchless reseller is reselling the same incumbent carrier's line back to the customer, and if there is any technical problem, the incumbent's technicians will arrive at the customer's location to resolve the problem. Thus, no matter how many times the switchless reseller or the independent telemarketing contractors selling its service accurately explain to a customer that the switchless reseller is a separate carrier competing for the customer's business, the resale relationship at issue may lead to customer confusion through no fault of the switchless reseller or the telemarketer.

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[25] Remarks of FCC Chairman Ajit Pai at the Hudson Institute, "The Importance of Economic Analysis at the FCC," at 3 (emphasis added).

[26] Indeed, it bears emphasizing that many of the complaints Telplex has faced were based on express allegations that the consumer formed the belief that they were misled into switching to Telplex only after speaking with the ILEC's representative – who obviously was not privy to the TPV recording demonstrating that Telplex complied with every aspect of the Commission's carrier change rules before switching the consumer's service.

Not only that, but as soon as the customer ports to the switchless reseller, the incumbent knows that it not only lost the customer, but knows which switchless reseller it lost the customer to. It is a common experience in the industry for the losing incumbent carrier to quickly and aggressively attempt to win back its former customer, typically between three days to three weeks after the port out. Because the ILEC operators are attempting to win back customers quickly and aggressively, switchless resellers often hear back from customers that the ILEC operators are giving out misinformation about the switchless reseller while trying to win back the customer. In fact, a number of complaints are on file where the customer specifically quotes an ILEC representative who told the customer that they were slammed in situations where the customer never raised a complaint with the losing carrier. Because the incumbent can reestablish service at essentially no marginal cost and thus easily undercut the reseller's service plan, and incentivize the customer to file slamming complaints by informing them that they will not be responsible for the submitting carrier's charges for the past thirty days, there is a clear incentive for the incumbent to disparage its competitor and encourage complaints to be filed.

Despite these financial incentives, and with only anecdotal "evidence" to go on, the Commission is considering rules that would tilt the competitive landscape in favor of the incumbent to an even greater degree, without any economic analysis of the impact on competition or consumers. "This practice significantly raises the odds of policies that do more harm than good, actually producing net negative benefits."[27]

[27] Remarks of FCC Chairman Ajit Pai at the Hudson Institute, "The Importance of Economic Analysis at the FCC," at 3.

IV. THE PROPOSALS IN THE NPRM ARE UNNECESSARY AND RIPE FOR ABUSE BY INCUMBENT CARRIERS TO THE DETRIMENT OF SWITCHLESS RESELLERS

If the Commission is going to conduct a serious economic analysis, the Commission needs to appreciate that the Commission's existing rules, the relevant parties' financial incentives, and the incumbent carrier's market power already make it difficult enough for switchless resellers to compete. At the same time, the Commission cannot ignore that its own rules encourage people to consumers to file complaints. Given that switchless resellers are already running up a down escalator, Telplex encourages the Commission to keep the following additional considerations in mind if it decides to take any action in this proceeding.

A. Requiring Default Carrier Freezes Would Unduly Inhibit Competition

1. Switchless Resellers Cannot Place Local Or Long-Distance Freezes On Their Customers' Accounts

Switchless resellers have no control over the ILEC or its switch to place freezes for their customers. In fact, since 2000, ILECs have pointedly refused to allow resellers to place freezes within the ILEC switches, while ILECs demand that competitive carriers follow onerous procedures to attempt to remove ILEC freezes. Thus, there is already a competitive imbalance, and making default freezes mandatory will only serve to further entrench the incumbent's control over the customer, precisely what the 1996 Act was enacted to reverse.

Moreover, by implementing the proposed rules, the switchless reseller would automatically be in violation because it cannot comply since it has no control over the ILEC's switch. Further, when only one party can place freezes on their customers (the ILEC), while the competitive switchless resellers cannot, it creates a one-way street in the wrong direction. This situation eliminates competition and will return the market to a monopoly. ILECs can PICC away competitors' customers but CLECs cannot PICC away from the dominant incumbent. For

the ILEC, this is like shooting fish in a barrel and never sharing the catch.

2. The Existing PICC Freeze Process Is Designed To Stifle Competition And Any Default Requirement Will Only Exacerbate A Broken System

In addition to the asymmetry problems above, every incumbent carrier has a different method of requesting removal of existing opt-in freezes. AT&T, for example, requires a three-page series of signed documents that first must be sent to the end user for their signature. Often, the CLEC will inform a prospective customer that it will be sending over this required paperwork, but the customer has no idea that they have a freeze and do not know what it is. This confusion and the hassle associated with faxing or mailing back paperwork alone result in only 2 out of 10 customers ultimately attempting to lift the freeze. Consumers expect to be able to switch their carriers easily. They do not expect the process to be the equivalent of a trip to the DMV.

If the CLEC gets the required paperwork back, then AT&T next requires the CLEC to scan and email the paperwork back, and the CLEC has to track the confirmation receipts sent by AT&T to ensure a confirmation is received for each freeze removal request. A second confirmation with a due date of when it will complete will then be sent by AT&T, which typically takes 3 business days. Then a third email comes in with a confirmation of completion that must be tracked, and then 24 hours later the CLEC *should* find that the freeze is removed. But in practice, in 20-30% of cases there is a problem, and AT&T fails to remove the freeze. In these cases, the CLEC then has to wait a few more days to have these problems resolved.

Another example is CenturyLink who has a completely different process than AT&T. In comparison, CenturyLink has a dedicated telephone number for the CLEC to call into with the end user on the call who is requesting the removal of the freeze. This allows the operator to refuse to release the freeze unless the CLEC representative drops off the call, at which time the

CenturyLink operator can engage in retention marketing.

Regardless of the incumbent, however, incumbent practices and requirements are not uniform, are complex and cumbersome to both competitors and consumers. The process is incredibly slow, particularly for customers that are used to being able to walk into a wireless carrier's store and have their wireless service ported over almost immediately. Removing existing freezes requires the expense of staff to try to get a customer to sign the required documentation after already getting their approval, manage the process to track the orders, draft the paperwork, and continue to follow up with the carrier to ensure that the service is properly ported out. In the majority of cases, the lengthy process becomes simply too time consuming for customers who often decide to just forgo the switch because it is too cumbersome, by design. In practice, making a new default procedure would eviscerate competition and allow only the incumbents to hold customers captive, without any corresponding rights or protections to competitive carriers. The Commission should reject this proposal outright.[28] To quote Chairman Pai, "[t]his is not data-driven decision-making, but corporate favoritism."[29]

If anything, the Commission should examine the anti-competitive results associated with incumbent carrier practices associated with opt-in freezes. The Commission should streamline and standardize how opt-in freezes can be released, including by requiring carriers to accept TPVs or letters of authorization that are compliance with the Commission's rules to be sufficient evidence to release the freeze, without any additional incumbent roadblocks to navigate.

B. "Double Checks" Are Ripe For Abuse

The Commission's alternative proposal to have the executing carrier "double-check"

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[28] Telplex does, however, support the removal of service distinctions for interLATA and intraLATA services in all respects, as well as "intraLATA toll." These service distinctions are incredibly confusing to consumers as the Commission itself notes.

[29] Dissenting Statement of (then) Commissioner Ajit Pai, *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106.

whether the consumer wants to switch providers is also ripe for abuse by incumbents for the same reasons as the default-freeze proposal.[30] There would be similar delays that discourage consumers who expect simple ports. Incumbent carriers would also undoubtedly use this process for aggressive winback marketing purposes. Further, it would be another one-way ratchet because resellers do not know that their customers intend to port out, and thus resellers would have no opportunity to double check if the consumer is switching back to the incumbent.

C. Altering The TPV Requirements Would Better Protect Consumers At Less Cost Compared To Recording Sales Calls

As for the Commission's proposal to require telemarketers to record the sales call,[31] based on information supplied by call centers, it would be cost prohibitive for these entities to comply with such a requirement. First, call centers would have to install recording technology on all of their lines, which would entail significant upfront costs. Further, given the volume of sales calls placed by these entities, coupled with the fact that disputes typically do not occur until at least 30-60 days after authorization – and often much later – the call centers simply cannot afford to store this amount of data even for a few months, let alone potentially for an indeterminate time. Given that a minute fraction of consumers ever complain about the carrier switch, and an even smaller percentage contend that they were somehow misled by the telemarketer, the added costs do not appear to be justified by the consumer protection safeguards, if any, such a requirement would add.

Instead, *if* the record supports enhancing consumer protection measures, because third-party verifiers are necessarily already recording this conversation that occurs immediately after the initial sales call, it would be much less burdensome if the Commission altered its third-party verification requirements as follows:

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30 NPRM, ¶¶ 23-31.

31 *Id.* ¶ 32-34.

1. Third-Party Verifiers Should Instruct Consumers To Stop The Confirmation Process

It bears emphasizing that the TPV process occurs immediately after the initial sales call, such that the telemarketer's representations will necessarily be fresh in the consumer's mind. Thus, the rules can be alerted to require the third-party verifier to easily instruct the consumer to stop the TPV verification process at any time the consumer is asked anything that is different than what the telemarketer stated. This added admonishment, coupled with an unambiguous question as to whether the person understands that the telemarketer has called on behalf of a separate, competing carrier, should eliminate any legitimate dispute that the telemarketer misled the consumer.

2. Third-Party Verifiers Should Be Required To Place A Secondary Outbound Call To The Consumer To Re-Confirm The Carrier Switch

To the extent that the record reveals that there is a substantial risk of doctored TPV recordings, additional assurances that the customer is genuinely requesting a carrier switch and obtaining enhanced evidence to prove it can be obtained through less burdensome and anti-competitive means than proposed by the Commission. Specifically, if necessary, the third-party verifier should call back the consumer to confirm that the customer can in fact be reached at the main billing telephone number given for the customer's account, and also to confirm again that the consumer is authorizing a carrier change in full knowledge that the submitting carrier is a separate carrier competing with the consumer's then-current carrier. If this recommendation were adopted, there would necessarily be two phone records that could be matched – the TPV company's and the consumer's – and an added recording further proving that the consumer is knowingly switching service.

3. Consumers Should Not Be Forced To Memorize All Of Their Numbers Or Know Arcane Regulatory Classifications As A Condition Of Switching Carriers

Finally, with respect to revising other TPV requirements, requiring consumers to "affirmatively state all telephone numbers to be switched,"[32] is unnecessary to protect consumers, particularly with respect to multi-line business customers. It is simply not reasonable to expect a manager of a business with 10-15 lines or more to be able to recite each of those telephone numbers from memory as a condition of switching their company's telephone service. Further, Telplex entirely supports the Commission's proposal to eliminate the requirement that verifiers must get confirmation for each service sold.[33] There is no justification for asking consumers if they want to separately switch services based on arcane regulatory classifications that are meaningless in today's marketplace.

CONCLUSION

For all the foregoing reasons, Telplex respectfully cautions the Commission from adopting the additional proposed rules under consideration in this proceeding because there is no factual justification for doing so. If the Commission does revise its rules, it should do so consistent with Telplex's comments above.

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32 NPRM, ¶ 36.

33 *Id.* ¶ 37.

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Respectfully submitted,

By: /s/

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